Supreme Court, U.S.
FILED
MAR 24 1999
OFFICE OF THE CLERK

No. 98-977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE AMERICAN BIBLE SOCIETY, *et al.*,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONERS

Russell Yager
Counsel of Record
Robert C. Walters
VINSON & ELKINS L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-7820

March 23, 1999

TABLE OF CONTENTS

Page

1. Richie's First-Impression Points Are Meritless. 1

A. The Sanctions Rest on Issues of First Impression. . 1

B. The Rule of "First Impression Immunity" Exists. . . 1

C. Richie Misreads *McKnight*. 2

2. The Sanctions Also Conflict with *Schooner Peggy*. . . . 3

3. Nothing in the Record Counsels Against Review. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases Page

American Bible Society v. Richie,
118 S. Ct. 596 (1997) 4

Burlington Northern R.R. Co. v. Woods,
480 U.S. 1 (1987) 3

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 2

McKnight v. General Motors Corp.,
511 U.S. 659 (1994) (per curiam) 2-3

Ozee v. American Council on Gift Annuities,
110 F.3d 1082 (5th Cir.), *vacated sub nom.*,
American Bible Society v. Richie,
118 S. Ct. 596 (1997) . . . . . *passim*

Ozee v. American Council on Gift Annuities,
143 F.3d 937 (5th Cir. 1998), *pet. for cert. filed*
67 U.S.L.W. 3409 (U.S. Dec. 14, 1998) . . . . . *passim*

Shinn v. College Station I.S.D., 96 F.3d 783
(5th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997) . . . 2

Swint v. Chambers County Commission,
514 U.S. 35 (1995) 5

Turgeon v. Premark Int'l, Inc., 87 F.3d 218
(7th Cir. 1996) 2-3

United States v. Schooner Peggy,
1 Cranch 103 (1801) 3-4

TABLE OF AUTHORITIES (cont.)

Statutes Page

Charitable Donation Antitrust Immunity Act of 1997, Pub. L. No. 105-26, 111 Stat. 241 (1997) 3-4
Charitable Gift Annuity Antitrust Relief Act of 1995, Pub. L. No. 104-63, 109 Stat. 687 (1995) 1,4

Rules

FED. R. APP. P. 38 ..... *passim*
FED. R. CIV. P. 12(b)(6) 3-4

Petitioners respectfully submit this reply to the Brief in Opposition filed by Respondent Boyd L. Richie.

1. Richie's First-Impression Points Are Meritless.

Richie asserts that "the sanctions in issue [do] not rest solely on issues of 'first impression'" and that "[n]o rule of 'first impression immunity' exists . . . ." Br. in Opp. at 9, 10; *see also id.* at 9-12, 13-15. Richie is mistaken.

A. The Sanctions Rest on Issues of First Impression.

The Fifth Circuit's opinions of April 1997 and June 1998 base the award of sanctions solely on Petitioners' failure to recognize as "obvious" the never-before-litigated proposition that Richie's allegation of a "hybrid" conspiracy involving "non-exempt" entities not only justified the district court's denial of their motions to dismiss Richie's antitrust claims pursuant to the Charitable Gift Annuity Antitrust Relief Act of 1995 ("the 1995 Act"), but also deprived the Fifth Circuit of jurisdiction to review that denial. PA at 4, 7, 27-28. Indeed, the court's June 1998 discussion of "first impression immunity," *id.* at 7, concedes, at least implicitly, that the sanctions rest squarely on issues of first impression.

B. The Rule of "First Impression Immunity" Exists.

Apart from his meritless contention that the sanctions do not rest on issues of first impression, Richie makes no effort to deny that the decision below conflicts with prior decisions of the First, Second, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits barring Rule 38 sanctions in cases of first impression. Although he describes the so-called "rule of 'first impression immunity'" as "nonexistent," Br. in Opp. at 9, he discusses none of the cases Petitioners cite for the proposition that the First, Second, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits follow such a rule. He does assert, without explanation, that Petitioners' Fifth Circuit cases "do not adequately support [the] general rule" that "imposing Rule 38 sanctions in cases of first impression is improper." Br. in Opp. at 11. But his

only authority for that assertion, *Shinn v. College Station I.S.D.*, 96 F.3d 783 (5th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997), neither discusses nor implicates that rule. *See id.* at 785-87 (sanctioning appeal foreclosed by authority holding that a person cannot recover under 42 U.S.C. § 1983 without pleading a deprivation of a constitutionally protected right). Thus, Richie does nothing to refute Petitioners' contentions that the decision below creates intercircuit and intracircuit conflicts meriting review.

C. Richie Misreads *McKnight*.

At page 11 of his Brief, Richie asserts that the decision below does not conflict with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), because "*McKnight* narrowly held that an issue over which other courts are divided and on which [this] Court has not ruled may not be the 'only basis' for an order imposing Rule 38 sanctions." Again, Richie is mistaken.

Reading *McKnight* to bar Rule 38 sanctions only when the lower courts are divided on the issue presented ignores *McKnight's* emphasis that "[f]iling an appeal was the only way petitioner could preserve the issue [presented] pending a possible favorable decision by this Court." 511 U.S. at 660. An appeal is just as necessary to preserve an appellant's rights in the event of a favorable decision in this Court when the appellant is the first to raise an issue as when she is the tenth, twentieth, or hundredth. Further, a split of authority below has never been a prerequisite to review in this Court. Thus, while a division among the lower courts clearly provides grounds for denying sanctions, the absence of such a division is irrelevant to *McKnight's* concern for protecting appellants while their issues of first impression percolate up to this Court. To further "the policy of not discouraging meritorious appeals," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 408 (1990), *McKnight* bars Rule 38 sanctions where, as here, an appeal is necessary to preserve an issue of first impression for decision in this Court. *See Turgeon v. Premark Int'l, Inc.*, 87 F.3d 218, 224 (7th Cir. 1996) (Rovner,

J., concurring in part and dissenting in part) (*McKnight* "held that sanctioning an appellant for filing a frivolous appeal was improper where the Court had not yet ruled on the issue . . . raised."). Thus, the decision below conflicts directly with *McKnight*.[1]

2. The Sanctions Also Conflict with *Schooner Peggy*.

Richie's assertion that *United States v. Schooner Peggy*, 1 Cranch 103 (1801), does not apply because the Charitable Donation Antitrust Immunity Act of 1997 ("the 1997 Act") did not amend Rule 38, *see* Br. in Opp. at 13, is meritless.

Just as Federal Rule of Civil Procedure 12(b)(6) allows a district court to dismiss a complaint that fails to state a claim upon which relief can be granted, Rule 38 allows a court of appeals to sanction an appeal that is frivolous. Moreover, just as a district court applying Rule 12(b)(6) to a particular motion must examine the applicable substantive rules of decision to determine whether the complaint states a claim on which relief can be granted, a court of appeals applying Rule 38 to an appeal from the district court's denial of that motion must examine the same substantive rules of decision to determine whether the appeal is frivolous. And, just as the 1997 Act altered ~~the rule of~~ decision applicable to Petitioners' motion to dismiss Richie's antitrust claim under

---

[1]Contrary to the assertions at pages 9-12 of Richie's Brief, nothing in *Burlington Northern Railroad Company v. Woods*, 480 U.S. 1 (1987), affects the *McKnight* analysis.

Burlington Northern involves the question "whether, in diversity actions, federal courts must apply a state statute that imposes a fixed penalty on appellants who obtain stays of judgment pending unsuccessful appeals." 480 U.S. at 2. The "case-by-case" language on which Richie relies merely draws a distinction between discretionary sanctions under Rule 38 and mandatory penalties under state law. It hardly supports Richie's notion that Rule 38 must be applied on a totally *ad hoc* basis, untethered by rules of general application.

Moreover, it is neither illogical nor unusual for courts to resolve issues on a case-by-case basis within parameters established by broad rules of general application. Indeed, the abuse-of-discretion standard of review necessarily assumes that rules of general application govern such case-by-case exercises of discretion in the lower courts.

Rule 12(b)(6) and changed what had been, in Richie's view, a claim on which relief could be granted into a claim on which relief cannot be granted, the 1997 Act also altered the rule of decision applicable to Petitioners' appeal from the denial of that motion to dismiss and changed what had been, in Richie's view, a frivolous appeal into a non-frivolous, successful appeal. Richie's notion that the 1997 Act could alter the propriety of dismissal without amending Rule 12(b)(6) but not the propriety of sanctions without amending Rule 38 finds support neither in law nor in logic.

Worse, Richie misses the point. Common sense and plain English compel the conclusion that this appeal cannot be both successful and frivolous. The lower court's naked assertion that it "do[es] not agree," PA at 7, can overcome neither this simple truth nor *Schooner Peggy*.[2]

3. Nothing in the Record Counsels Against Review.

As demonstrated *supra* at 1, the record belies Richie's claim that the sanctions actually rest on something other than an issue of first impression. It also refutes Richie's claim that the sanctions could have rested on other grounds.

The Fifth Circuit's April 1997 and June 1998 opinions clearly contradict Richie's assertion that the sanctions could properly rest on Petitioners' appeals of various pendent issues. The April 1997 decision never reached the question whether jurisdiction existed over the additional issues of state and federal law that some of the Petitioners appealed under the doctrine of pendent-issue appellate jurisdiction. Reaching that issue was unnecessary because the court concluded that it lacked *Cohen* jurisdiction of Petitioners' principal appeals from the denial of their motions to dismiss Richie's antitrust claims under the 1995 Act. *See* PA at 18. Thus, the April 1997 decision contained no holding on which

---

[2]Richie makes no effort to address the argument at pages 9, 14-16 of the Petition that the Fifth Circuit's decision to judge the alleged frivolity of this appeal by reference to the 1995 Act rather than the 1997 Act also violates this Court's mandate in *American Bible Society v. Richie*, 118 S. Ct. 596 (1997) ("*American Bible Society I*").

to base Richie's conclusion that the appeals of pendent issues were independently sanctionable. Further, the June 1998 decision resolved the pendent issues favorably to Petitioners by (a) denying Richie's motion to dismiss Petitioners' appeals, (b) granting all the relief requested by the appeals of pendent federal issues (dismissal of Richie's antitrust claim), and (c) granting limited relief with respect to the pendent state issues: a "remand to the district court for the limited purpose of determining whether any state law claims survive" in light of the dismissal of Richie's antitrust claim and the terms of 28 U.S.C. § 1367(c). PA at 5-6, 7-8 n.7. Thus, the record contradicts Richie's assertion that some Petitioners' appeals of pendent issues justify the sanctions and diminish the need for review.[3]

The record also disproves Richie's assertion that Petitioners' request for a writ of mandamus provides a defensible basis for the sanctions. *American Bible Society I* vacated the Fifth Circuit's April 1997 denial of Petitioners' request for mandamus, and the Fifth Circuit declined to reach the mandamus issue after remand. *See* 118 S.Ct. 596; PA 7-8 n.7. Moreover, Richie moved for sanctions only in connection with Petitioners' appeals and not in connection with the petition for mandamus. Thus, the petition for mandamus clearly cannot sustain the sanctions.

More importantly, the decision whether to review the sanctions order in this case should turn on the precedential effect of what the Fifth Circuit actually held, as reflected in the June 1998 opinion the Fifth Circuit actually issued.

---

[3]Moreover, as Richie conceded at page 6 of his Motion to Dismiss Appellants' Appeals (filed Dec. 6, 1996), several Petitioners appealed only the district court's denial of their motion to dismiss and the inextricably intertwined decision to allow Richie to file the amended complaint raising the issues on which the court relied to deny that motion. Such appeals clearly were not sanctionable. *Swint v. Chambers County Commission*, 514 U.S. 35, 51 (1995) (renouncing doctrine of pendent-party appellate jurisdiction but leaving open possibility of pendent-issue appellate jurisdiction of issues inextricably intertwined with issue immediately appealable under the collateral-order doctrine).

Later courts will not have Richie's allegations of other purported misconduct to help them apply the Fifth Circuit's reasoning to subsequent appeals. Thus, this Court should review the sanctions unless the June 1998 opinion, unadorned by other allegations, properly applies an appropriate standard for imposing Rule 38 sanctions in cases of first impression. As stated in the Petition for Writ of Certiorari, that opinion applies no such standard.[4]

CONCLUSION

For the reasons stated above and in their Petition for Writ of Certiorari, Petitioners respectfully request that the Court review and reverse the June 12, 1998, order of the United States Court of Appeals for the Fifth Circuit sanctioning Petitioners under Federal Rule of Appellate Procedure 38.

March 23, 1999

Respectfully submitted,

Russell Yager
Counsel of Record
Robert C. Walters
VINSON & ELKINS L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-7820
Attorneys for The American Bible Society, The Moody Bible Institute of Chicago, and American Leprosy Missions, Inc.

[4]Richie makes no response to the argument at pages 9,16-17 of the Petition that, even if the Fifth Circuit's interpretation of the 1995 Act were correct, imposing sanctions based on the court's determination that its reading of that Act was "obvious" and "not arguable" was an abuse of discretion that independently justifies review.

Thomas R. Jackson
Patricia Villareal
Chrysta L. Castaneda
JONES DAY REAVIS & POGUE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-3939
Attorneys for Hay/Huggins Company, Inc.

George W. Bramblett, Jr.
Noel M. B. Hensley
Michelle McCoy Monger
HAYNES & BOONE, L.L.P.
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
(214) 651-5000
Attorneys for Baptist Foundation of Texas

George C. Chapman
Gregory S. C. Huffman
William M. Katz, Jr.
THOMPSON & KNIGHT, P.C.
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
(214) 969-1700
Attorneys for The Lutheran Church-Missouri Synod, Planned Giving Resources, Prerau & Teitell, Planned Giving Services, Inc., and The American Council on Gift Annuities, Inc.

Susan Abbott Schwartz
James D. Nations
HENSLEE, FOWLER, HEPWORTH
& SCHWARTZ, P.L.L.C.
4131 N. Central Expressway
Suite 680
Dallas, Texas 75204-2117
(214) 219-8833
Attorneys for General Conference Corporation of Seventh-Day Adventists and Loma Linda University

Richard T. McCarroll
Walter H. Mizell
BROWN MCCARROLL &
OAKS HARTLINE, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701-4043
(512) 472-5456
Attorneys for Texas District, Lutheran Church-Missouri Synod and Lutheran Foundation of Texas

Thomas D. Graber
LANGLEY & BRANCH, P.C.
717 N. Harwood, Suite 1700
Dallas, Texas 75201
(214) 953-7200
Attorneys for American Baptist Foundation, American Baptist Foreign Mission Society, and Evangelical Lutheran Church in America

Charles M. Barnard
807 Eighth Street, Suite 1006
City National Building
Wichita Falls, Texas 76301
(940) 761-3888
Attorney for University of Colorado Foundation, Inc.